Supreme Court, U. S.
FILED
AUG 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-191

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

LLOYD E. HUMPHREYS
HUMPHREYS & WARNER
809 Merchants National Bank
Cedar Rapids, Iowa 52401

W. HOWARD SMITH
Attorney at Law
330 First Street SE
P. O. Box 4708
Cedar Rapids, Iowa 52407
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Prayer 1

Opinion below 2

Jurisdiction 2

Questions presented for review 4

Statutory provisions involved 4

Statement of the case 4

Reasons for granting the writ 6

Conclusion 9

Appendix A—Opinion of United States Court of Appeals for the Eighth Circuit A-1

Appendix B—Order denying petition for rehearing A-13

Appendix C—Reply Brief of appellant A-14

Case Cited

Peterman v. Chicago, Rock Island and Pacific Railroad Company, 493 F2d 88 ..... 2, 6

Statutes and Rules Cited

Federal Rules of Appellate Procedure:

Rule 4 ..... 4, 7

Rule 41 ..... 4, 7

Rule 45 ..... 4, 7

Federal Rules of Civil Procedure:

Rule 50 .....3, 4, 5, 7, 8

Rule 51 .....3, 4, 8

Rule 60 7

Rule 69 4

28 U.S.C. §1254 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Frank L. Peterman, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on May 6, 1975.

OPINIONS BELOW

The judgment of the District Court of the United States for the Southern District of Iowa, based upon jury verdict in favor of Peterman was originally rendered on or about July 19, 1973. The trial court on its own Motion on or about October 9, 1973, set the judgment in favor of the Petitioner aside. The United States Court of Appeals for the Eighth Circuit by way of Writ of Mandamus held the trial court acted without jurisdiction and set aside the order of the trial court and reinstated the judgment on jury verdict. (See printed opinion *Peterman v. Chicago, Rock Island and Pacific Railroad Company*, 493 F2d 88). Petition by the Railroad for Writ of Certiorari to the United States Supreme Court was denied on or about June 10, 1974.

On March 15, 1974, mandate issued from the Circuit Court of Appeals, in the form of a certified copy of its judgment and its opinion holding the trial court exceeded its jurisdiction in granting a new trial, and ordered reinstatement of the judgment rendered on the jury verdict on July 19, 1973. The mandate was recorded in the trial court and notice issued to counsel on June 19, 1974.

The Respondent appealed on August 2, 1974. Petitioner filed a Motion to Dismiss for untimely appeal. The opinion of the United States Court of Appeals for the Eighth Circuit (unreported) overruling the Motion to Dismiss, setting aside the original jury verdict and granting a new trial is printed in Appendix A, pages A-1-A-12.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eighth Circuit in this second appeal was entered May 6, 1975. A timely Petition for Rehearing was filed, and Petition for Rehearing was denied May 28, 1975 (Appendix B infra, page A-13). The jurisdiction of this Court is conferred under 28 USC § 1254. Review by this Court of the decision of the Court of Appeals for the Eighth Circuit is required because:

(a) The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with other courts of appeals on the same matter; in conflict with the applicable decisions of this Court, and has departed from the accepted and usual course or judicial proceedings in such a manner as to warrant the exercise of this Court's power of supervision; in that it allowed a civil appeal to it after the time for appeal expired, without an extension of time, and after one (1) year from the judgment of the trial court, citing criminal cases which are not applicable here. (See decision Appendix A infra, pages A-1-A-12).

(b) The Court of Appeals for the Eighth Circuit has decided an important question of federal law which is in direct conflict with Federal Rule of Civil Procedure 50(d) in that it cites that Rule as authority for granting an "Appellant" a new trial when the plain words of the Rule limit such relief to the "Appellee".

(c) The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with applicable decisions of this Court and other courts of appeals, and has departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by finding as a ground for a new trial an instruction that was not objected to by Appellant Railroad, contrary to Federal Rule of Civil Procedure 51.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

(1) Can an Appellant appeal from a civil judgment after the time for appeal expired, without an extension of time, and without good cause shown?

(2) When is the mandate of a Circuit Court of Appeals effective?

(3) Can the Circuit Court of Appeals under FRCP 50(d) grant an Appellant rather than Appellee a new trial?

(4) Whether criminal cases in which the Clerk accepted Notices of Appeal after the time for appeal expired are authority to allow a delinquent civil appeal.

(5) Can a Circuit Court on its own motion, assign as error, the giving of an instruction not objected to by a party?

STATUTORY PROVISIONS INVOLVED

FRAP 4(A), 41, 45

FRCP 50(d), 51, 69(b)

STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Iowa, Davenport Division, and resulted in a jury verdict for the Plaintiff-Petitioner Frank L. Peterman, in the amount of $35,000.00 on July 19, 1973. On October 9, 1973, the Court overruled Defendant's Motion for Judgment NOV finding there was sufficient evidence to submit the issue of Last Clear Chance to the jury. The Court then on its own motion, after the ten day period therefor, granted a new trial, assigning allegedly confusing interrogatories.

The Petitioner took a Writ of Mandamus action to the Circuit Court of Appeals on the grounds that the trial court acted beyond its jurisdiction and authority in granting a new trial. The Circuit Court on March 15, 1974, granted the Writ of Mandamus and vacated the Order of the trial court as a void Order without jurisdiction or authority.

The Respondent-Railroad, petitioned for Certiorari to the United States Supreme Court. The United States Supreme Court denied Certiorari on or about June 10, 1974. On June 19, 1974, the trial court,

> "—filed Judgment Mandate Vacating New Trial Order and Reinstating the Judgment on the Verdict, assessing costs to the Respondent and notifying counsel."

On July 24, 1974, the Respondent-Railroad filed a "Motion for Entry of Judgment and in the Alternative for an Extension of Time for Filing Notice of Appeal", not stating any recognized grounds to extend time under the FRCP. The trial court, without hearing or notice, entered an "Order Reinstating Judgment Entered July 19, 1973" on July 25, 1974. The Respondent-Railroad filed a Notice of Appeal on August 2, 1974. (One year and two weeks after judgment on the verdict and 44 days after mandate of the Circuit Court was recorded in the trial court).

The Circuit Court of Appeals overruled a Motion to Dismiss the appeal by Petitioner, citing two criminal cases which held that the Clerk of Court by accepting Notices of Appeal waives the time limit to appeal. It granted a new trial to Appellant on or about May 6, 1975, citing as authority FRCP 50(d) and assigned as error an instruction that was not objected to by the parties.

A timely Petition for Rehearing before the Court of Appeals was overruled on or about May 28, 1975.

REASONS FOR GRANTING THE WRIT

How many months or years as in this case, does a Defendant-Railroad have in which to appeal?

The Notice of Appeal upon which Defendant-Respondent relies was filed August 2, 1974, although its Motion for Judgment NOV was overruled by the trial court on October 9, 1973, the trial court ordering on its own motion, a new trial. In the meantime of course, this Plaintiff successfully sought and obtained a Writ of Mandamus from the Eighth Circuit Court of Appeals: the holding being that the action of the trial court was void and without jurisdiction when it entered sua sponte an Order for a new trial. That Order was entered by the Court of Appeals in March, 1974, and Judgment Mandate was filed with Clerk of trial court on June 19, 1974.

This Notice of Appeal herein was filed August 2, 1974, 44 days after the filing of the Mandate, and almost 10 months after the overruling of the Motion for Judgment NOV. Both the trial court and Court of Appeals held the Motion for Judgment NOV should be overruled (The Court of Appeals stating "we are convinced that—the district court did not err in denying the Appellant's Motion for Judgment n.o.v."), but each court on its own motion held that a new trial should be granted. It has already been determined that the action of the trial court in granting a new trial was void and without jurisdiction. *Peterman v. Chicago, Rock Island and Pacific*, 493 Fed.2d 88.

It now remains to be determined whether the action of the Court of Appeals was erroneous for either one of three reasons;

a. Its grant of a new trial is without jurisdiction because the Defendant's Notice of Appeal was not timely filed, or,

b. Whether Rule 50(d) of the Federal Rules of Civil Procedure is authority for granting an appell*ant* a new trial when the Rule uses the word "appell*ee*", or,

c. It erroneously assigned as error an instruction not objected to by either party.

This case presents a patent violation of FRAP 4A in that a civil appeal was taken after the 30 days time for appeal had expired; without any order extending time for any reason.

The Eighth Circuit Court cites two *criminal* cases in support of their overruling the Petitioners Motion to Dismiss. Both of those were Eighth Circuit Court decisions holding that in a criminal case under the Federal Criminal Rules the Clerk could waive the time by accepting a delinquent criminal appeal. This is an unwarranted extension of that doctrine into the civil area violating FRAP 4A.

It is contrary to all existing civil appellate law the other Circuit Courts of Appeal decisions and the United States Supreme Court.

Pursuant to FRAP 41 and 45, the mandate of the Circuit Court becomes effective after denial of certiorari when it is docketed by the Clerk of the trial court. No further action by the trial court is required. If so, the Notice of Appeal here was filed fourteen (14) days after time for such appeal expired. No order under FRCP 60(b) was obtained extending time for appeal.

In this case the Respondent objected to the giving of an instruction on Last Clear Chance doctrine on the ground that the evidence did not warrant it. The Respondent requested special interrogatories, which were given. No other objections were made. The appeal was taken by the Respondent on the

basis that the evidence did not warrant the instruction and it should have been granted a judgment NOV.

> "The defendant is not here contending that the Interrogatories were improper in form, and is not objecting to the form of Instruction No. 21 on last clear chance . . ." (From page 6 of Plaintiff's Reply Brief, Appendix C, p. A-14).

The Circuit Court overruled those contentions and affirmed the trial court's overruling of Respondent's objection and motion for judgment NOV. It then continued and vacated the judgment due to the form of the instruction given by the trial court; thereby assigning as error an instruction not objected to by the Respondent. A clear contradiction to FRCP 51.

The granting of a new trial was based on the authority of FRCP 50(d). Yet, Rule 50(d) provides as follows:

> "If the motion for judgment notwithstanding the verdict is denied, *the party who prevailed on that motion may, as appellee* (but here, the appellee prevailed on that motion and does not want a new trial) assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court *erred* in denying the motion for judgment notwithstanding the verdict. (But here, the appellate court states that trial court did not err in denying the motion.) If the appellate court reverses the judgment (surely the rule is referring to a reversal of the ruling on judgment notwithstanding the verdict—which ruling was *not* reversed) nothing in this rule precludes it from determining that the appellee (but appellee does not want a new trial) is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." (Emphasis supplied.)

CONCLUSION

This case involves a considerable number of federal procedural questions and presents an opportunity to the Court to delineate certain procedural rules, set out guidelines and resolve existing differences in the Circuit Courts of Appeal.

Respectfully submitted,

LLOYD E. HUMPHREYS
HUMPHREYS & WARNER
809 Merchants National Bank
Cedar Rapids, Iowa 52401

W. HOWARD SMITH
Attorney at Law
330 First Street SE
P.O. Box 4708
Cedar Rapids, Iowa 52407

APPENDIX

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 74-1604

Frank L. Peterman,
Appellee,
v.
Chicago, Rock Island and Pacific Railroad Company,
Appellant.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: April 14, 1975

Filed: May 6, 1975

Before Matthes, Senior Circuit Judge, Ross and Webster, Circuit Judges.

Matthes, Senior Circuit Judge.

This railroad crossing collision case involves the so-called last clear chance doctrine, which has been viable in Iowa for nearly a century. See list of cases appended to Note, *The Iowa Doctrine of Last Clear Chance*, 34 Iowa L. Rev. 480, 495 (1949). A jury awarded plaintiff Frank L. Peterman $35,000 as damages for injuries he sustained when the converted school bus he was driving was struck by a train owned and operated by the appellant railroad company. The collision occured at a railroad crossing near Tiffin, Iowa.[1]

---

[1] Jurisdiction is based on diversity of citizenship, and the requisite amount in controversy.

I. **Jurisdiction**

As its sole basis for obtaining post-verdict relief, the appellant filed a timely motion for judgment n.o.v. It did not file a motion for new trial pursuant to Rule 59, Fed. R. Civ. P., nor did it seek a new trial as an alternative form of relief to its motion for judgment n.o.v. as authorized by Rule 50(b), Fed. R. Civ. P.

The district court denied the appellant's motion for judgment n.o.v., but sua sponte ordered a new trial. These actions were taken more than 10 days after entry of judgment. *See* Rule 59(d), Fed. R. Civ. P. Thereafter, plaintiff filed a notice of appeal and a petition for writ of mandamus contending that the district court had exceeded its jurisdiction in granting the new trial. After a hearing, we held that the trial court did not have the power to grant sua sponte a new trial more than 10 days after the entry of judgment and issued the writ of mandamus vacating the order granting the new trial. *See Peterman v. Chicago, R. I. & Pac. R. Co.*, 493 F.2d 88 (8th Cir.), *cert. denied*, — U.S. — (1974).

After the Supreme Court's denial of certiorari and this court's subsequent filing of its mandate, the railroad company moved for entry of judgment on the jury's verdict. The district court formally entered the judgment and the railroad company appealed.

Plaintiff has opposed the appellant's appeal contending that the appellant filed its notice of appeal out of time and that, therefore, this court lacks jurisdiction. The parties exhaustively presented this jurisdictional issue in their briefs and at oral argument. All of the proceedings relating to the timeliness of the appeal have been considered in light of the applicable law. From our exploration of the issue, we are led to conclude that we are vested with jurisdiction to consider the merits of the appeal. *See generally United States v. Williams*, 508 F.2d 410

(8th Cir. 1974); *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). Accordingly, the plaintiff's motion to dismiss is denied.

II. **The Merits**

The merits of this controversy concern whether plaintiff was entitled to recover under the Iowa last clear chance doctrine. In this respect, the railroad company raises two contentions on appeal. First, it asserts that the evidence was insufficient as a matter of law to warrant submission of the last clear chance doctrine to the jury. Secondly, it contends that the general verdict was inconsistent with the jury's answers to the district court's special interrogatories. In its answers the jury found the plaintiff guilty of negligence that was a proximate cause of the injury. Consequently, the railroad company claims that the district court should have granted its motion for judgment n.o.v.

We consider these issues seriatim.

A. **Sufficiency of the Evidence**

Under Iowa law, the last clear chance doctrine cannot be submitted to the jury unless the evidence is sufficient for the jury to find that the defendant (1) had knowledge of plaintiff's presence, (2) realized or by the exercise of ordinary care should have realized the plaintiff's peril, (3) had the ability to avoid the injury to the plaintiff, and (4) failed to avoid the injury. *See, e.g., Ackerman v. James*, 200 N.W.2d 818, 827 (Iowa 1972); *Albrecht v. Rausch*, 193 N.W.2d 492, 495 (Iowa 1972); *Duffy v. Harden*, 179 N.W.2d 496, 501 (Iowa 1970). The appellant admits that the evidence was sufficient for the jury to find elements (1), (2) and (4). However, it asserts that the third element, the ability to avoid colliding with the plaintiff's vehicle, was not shown. *See Albrecht v. Rausch, supra.*

Specifically, appellant submits that there was no evidence that the train crew had sufficient time to avoid the collision after they knew or should have known that plaintiff was in a position of peril. In considering this position, we observe that our review of the district court's denial of a motion for judgment n.o.v. is severely limited: we must view the evidence in the light most favorable to the plaintiff as the party who prevailed below, giving the benefit of all favorable inferences to him. *See, e.g., Griggs v. Firestone Tire & Rubber Co.*, —F.2d— (8th Cir. 1975); *Hanson v. Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960).[2]

We do not propose to engage in an extended discussion of the evidence favorable to plaintiff. The transcript has been carefully scrutinized and we are in agreement with Judge Stuart's analysis thereof, which is shown in his memorandum opinion denying the motion for judgment n.o.v. As the district court stated in pertinent part:

> The Court is of the opinion that under the evidence presented, the jury could have found that the train crew saw the bus when the train was about 1000 feet from the intersection. That the bus stopped about 55 feet from the centerline of the railroad track and then proceeded forward in low gear to the point of the accident. A stop sign was attached to a railroad cross buck sign about 35 feet from the centerline of the track. The bus proceeded past the stop sign and cross buck at a speed of about six miles per hour. The train was traveling at a speed of about 55 miles per hour. No effort was made to slow the speed of the train until it was 25 to 100 feet from the crossing. The train hit the back four feet of the bus. The front of the

[2] The Iowa courts follow this same standard of review. *See, e.g., Ackerman v. James, supra,* 200 N.W.2d at 824; *Lynch v. Des Moines Ry. Co.*, 215 Iowa 1119, 1122, 245 N.W.2d 219, 220 (1932), and cases cited therein.

> bus would have had to travel 60 to 65 feet from the cross buck to the point of collision. This would have taken six or seven seconds and would have placed the train about 560 feet away from the crossing when the bus passed the cross buck. The engineer would have had six to seven seconds to slow the train down.

We add only that, in addition to these findings, the review of the transcript reveals that the jury could have found that the crossing was extremely dangerous, since a number of accidents had occurred at the crossing in the past, and that the train engineer knew of this hazardous condition.

In light of these facts, we can only conclude that the evidence was sufficient for the district court to submit the last clear chance doctrine to the jury. We cannot agree with the appellant that those Iowa cases that have allowed train crewmen to rely on the custom of travelers to drive up to the tracks before stopping require an opposite result.[3] The application of that custom is precluded by the particular facts in this case, which show that the engineer was aware that the crossing was hazardous and that the crewmen observed the plaintiff proceed into the crossing without stopping at the stop sign and cross bucks. *See Tilghman v. Chicago & Nw. Ry. Co.*, 253 Iowa 1339, 1344, 115 N.W.2d 165, 170 (1962). *See also Strom v. Des Moines & Cent. Iowa Ry. Co., supra,* 248 Iowa at 1062, 82 N.W.2d at 787.

Under these circumstances, the following statement from *Tilghman v. Chicago & Nw. Ry. Co., supra,* 253 Iowa at 1346, 115 N.W.2d at 169-70, is convincing:

> It was not necessary, in order to avoid the collision, to stop the train before it reached the crossing. If its speed

[3] *See, e.g., Strom v. Des Moines & Cent. Iowa Ry. Co.*, 248 Iowa 1052, 82 N.W.2d 781 (1957); *Arp v. Illinois Cent. R. Co.*, 230 Iowa 869, 299 N.W. 413 (1941); *Williams v. Mason City & Ft. D. Ry. Co.*, 205 Iowa 446, 214 N.W. 692 (1927). *See also Mast v. Illinois Cent. R. Co.*, 79 F. Supp. 149, 163 (N.D. Iowa 1948).

had been reduced just a little or a little sooner plaintiff could have crossed the railroad track in safety. If the train had reached the crossing just one second later than it did this collision would have been avoided. At least the jury could properly find. As it was, the truck [here bus] was partly across the track when it was struck without substantial reduction in the train's speed. * * *

The fact the trainmen may not have had time, after realization of plaintiff's peril to stop the train does not prevent operation of the last clear chance doctrine where the evidence indicates that had they checked the speed of the train it would have enabled plaintiff to clear the crossing.

Thus, as the district court held:

> The jury could have found (1) the train crew should have realized plaintiff did not know this train was approaching because he drove past the cross buck and (2) as reasonable men they should have, at that time, taken steps to slow down the train and (3) action at that time would have avoided the collision. Tilghman v. Railway, supra, at 1347.

We therefore hold that the evidence was sufficient for the court to submit the last clear chance doctrine to the jury.

B. **Jury Instructions**

Prior to delineating the elements of the last clear chance doctrine, the district court in the prelude to Instruction No. 21 informed the jury:

> Even if you have found the plaintiff, Frank L. Peterman, guilty of negligence *which was a proximate cause of the collision* he might still recover under the doctrine of last clear chance.

(Emphasis supplied.) Special interrogatories were requested by the appellant. The district court, in response to the request drafted special interrogatories, which with the jury's answers are here set out:

SPECIAL INTERROGATORIES

1. Was the defendant railroad company guilty of negligence which was the proximate cause of the collision and resulting injuries and damages?

Yes X

No . .

2. Was the plaintiff guilty of negligence which was a proximate cause of the collision and resulting injuries and damages?

Yes X

No . .

3. If the answer to the second interrogatory is yes, did the defendant railroad have the Last Clear Chance to avoid the collision?

Yes X

No . .

The instructions and the interrogatories make it apparent that the district court was of the view that even if plaintiff's negligence was a proximate cause of the collision, he could nevertheless recover upon the additional finding that the appellant railroad company had the last clear chance to avoid the collision. Appellant objected to the form of the instructions and interrogatories at trial, and it now vigorously contends that, under the latest pronouncement of the Supreme Court of Iowa in *Ackerman v. James, supra,* the plaintiff cannot recover since the trier of fact found that plaintiff's negligence was a proximate cause of his injury.

Our research indicates that for a number of years the Iowa authorities were split over the theory underlying the last clear chance doctrine. Some cases regarded the doctrine as an exception to the rule that contributory negligence is a complete bar to recovery. *See, e.g., Lynch v. Des Moines R. Co.*, 215 Iowa 1119, 245 N.W. 219 (1932); *Keefe v. Chicago & Nw. R. Co.*, 92 Iowa 132, 60 N.W. 503 (1899). Other cases considered the doctrine as a phase of proximate cause. *See, e.g., Albrecht v. Rausch, supra,* 193 N.W.2d at 495; *Vreugdenhil v. Kunkel,* 256 Iowa 460, 127 N.W.2d 630 (1964); *Groves v. Webster City,* 222 Iowa 849, 270 N.W. 329 (1936); *Albrecht v. Berry,* 202 Iowa 250, 208 N.W. 205 (1926).[4]

The difference in theories was resolved and the dispute laid to rest in the *Ackerman* case, where the Supreme Court of Iowa, in quoting Justice Brennan, then a Justice of the New Jersey Supreme Court,[5] explicitly held that:

> "[T]he best considered decisions properly catalogue the alleged last clear chance doctrine as simply an application of the principle of proximate cause."

200 N.W.2d at 829.[6]

---

[4] The author of the Note, *The Iowa Doctrine of Last Clear Chance,* in 34 Iowa L. Rev., *supra* at 481, observes:

> Despite the large number of cases in which the Iowa Supreme Court has addressed itself to the last clear chance doctrine, its basis and legal theory is not at all settled. Parallel lines of authority support two theories. One line bottoms the doctrine on the theory of proximate cause. [Citing cases.] * * * The other line of authority views the doctrine as an exception to the contributory negligence rule. [Citing cases.]

[5] Quote from *Pangborn v. Central R. Co. of New Jersey,* 18 N.J. 84, 101, 112 A.2d 705, 713 (1955).

[6] The *Ackerman* Court also held that the viability of the last clear chance doctrine was not affected by the recent amendment to § 619.17 of the Iowa Code Annotated, which now places on the defendant the burden of proving that the plaintiff was guilty of contributory negligence, whereas previously the plaintiff was required to prove freedom from contributory negligence.

In the process of delineating the proximate cause theory, the *Ackerman* Court borrowed extensively from Justice Brennan's decision in *Pangborn.* The *Ackerman* Court was influenced by the following language from *Pangborn*:

> * * * The question with respect to negligent conduct on the part of the person injured through the negligence of another as affecting the former's right to recover thus becomes resolved in every case into one as to whether or not that conduct of his was a proximate cause of the injury. If it was, then the contributory negligence rule is applicable, and the plaintiff will by its operation be barred from recovery. * * * It follows that the decisive question, in each case where a plaintiff injured is found to have been at fault in the premises from his failure to exercise the required degree of care, resolves itself into one as to whether that fault was or was not a proximate cause of the injury, and that the answer to that question will infallibly determine whether or not it will bar a recovery.

18 N.J. at 101, 112 A.2d at 714, *quoted in Ackerman, supra,* 200 N.W.2d at 830.

With these considerations in mind, the *Ackerman* Court held:

> We hold in a personal injury case where the injured party has alleged facts essential to the application of the doctrine of last clear chance as a theory of recovery evidence relating to those facts is admissible as relevant to a determination of the issue of proximate cause. This is so whether the issue relates to defendant's negligence being a proximate cause of plaintiff's injury or to plaintiff's negligence being a bar to his recovery. . . .
>
> It would follow that if the trier of fact finds plaintiff's negligence was a proximate cause of his injury, he cannot recover. On the other hand, a finding that defendant's

> negligence was the *sole* proximate cause of the injuries would be justified where such trier finds plaintiff's negligent conduct placed him in a position of peril and further finds defendant, with knowledge of plaintiff's presence on the highway, failed to use ordinary care in exercising the ability at his command to avoid striking plaintiff after he realized or in the exercise of ordinary care should have realized the plaintiff's perilous position.

200 N.W.2d at 830

Confronted with the Iowa Supreme Court's unequivocal pronouncement, we are not persuaded by plaintiff's argument that the answers to the special interrogatories should be read to mean that the jury found that appellant's negligence was the *sole* proximate cause of the collision However, we also are not convinced by the railroad company's argument that the jury's affirmative answer to Special Interrogatory No. 2 requires a holding that the plaintiff cannot recover. Since Instruction No. 21 and the special interrogatories were not phrased in the theory of proximate cause, legal conclusions based on the holding in *Ackerman* cannot apply. Thus the dichotomous interpretations that the answers to the special interrogatories can be given make it impossible for us to determine the jury's state of mind.

Judge Stuart, who presided over the trial of this case, was equally troubled over the phraseology of the instructions and the special interrogatories. In his memorandum denying appellant's motion for judgment n.o.v. and sua sponte granting a new trial, Judge Stuart stated:

> It is therefore apparent that instructions 21 and 22 contain erroneous statements of the law and that under the correct law the general verdict is contrary to the jury's answer to interrogatory number 2.
>
> * * * It would not be fair or in the interest of justice to grant a judgment NOV because of the conflict between the general verdict and the special interrogatory in view of the erroneous instructions given. More properly the jury should have been told that plaintiff could recover even if he had been negligent if defendant's negligence intervened between his negligence and the collision and became the sole proximate cause thereof.[7]

Therefore, we hold that the case was improperly submitted since the law, as established in *Ackerman*, was not properly delineated.

III. **Remedy**

We are convinced that even though the instructions and the special interrogatories were erreoneous, the district court did not err in denying the appellant's motion for judgment n.o.v. Rather, we agree with the appellant that we should grant alternative relief by remanding the case for a new trial. Rule 50(d), Fed. R. Civ. P., does not prohibit this court from taking this action. Indeed, the rule provides: "If the appellate court reverses the judgment, nothing in this rule precludes it from determining that appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted." *See Slaughter v. Philadelphia National Bank*, 417 F.2d 21, 33 n.22 (3d Cir. 1969). *See also Neely v. Eby Construction Co.*, 386 U.S. 317, 323-324, 329 (1967). *Cf. Weade v. Dishman Co.*, 337 U.S. 861 (1949).

Inasmuch as the district court has previously determined that the case should be retried, we decline to remand to permit that court to again decide the question. We conclude that in the interest of justice the judgment of the district court should be

---

[7] Unfortunately, the granting of the new trial by the district court on its own initiative was untimely. This precipitated the mandamus proceeding.

vacated and the cause remanded to the district court for a new trial under appropriate instructions.

The costs shall be taxed equally between the parties. It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

74-1604 September Term, 1974

Frank L. Peterman, Appellee, vs. Chicago, Rock Island and Pacific Railroad Company, Appellant.	Appeal from the United States District Court for the Southern District of Iowa.

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 28, 1975

APPENDIX C

Reply Brief—Chicago, Rock Island & Pacific Railroad Company, Appellant, United States Court of Appeals No. 74-1604.

It should be noted that *Bruggeman*, upon which the plaintiff so heavily relies, has not been cited in Iowa for twenty years. It was last cited in *Menke v. Peterschmidt*, 246 Iowa 724, 65 NW2d 69, and there only to point out the "confusion in the underlying theory of the last clear chance doctrine in Iowa." There the Supreme Court said "The underlying theory upon which the doctrine rests is in some confusion. We have said at times it is an exception to the rule barring recovery to one who has been guilty of contributory negligence. (citing cases, including *Bruggeman*). More often, we have held to the causation theory as the real support for the rule . . ." Prior to that, *Bruggeman* was last cited in *Groves v. City*, 222 Iowa 849, 270 NW 329 (1937), and there only for the elements of the doctrine, not in support of the discredited underlying theory for last clear chance. The "confusion" in the Iowa cases, largely caused by *Bruggeman* and a few kindred cases, has been resolved by *Ackerman*.

Apparently plaintiff believes that the Jury's afiirmative Answer to Interrogatory No. 1 is tantamount to finding that defendant's negligence was the sole proximate cause of the collision and that, therefore, plaintiff can recover even under the proximate cause theory of negligence. The problem with this argument is that although Interrogatory No. 1 found that defendant's negligence was the proximate cause of the collision, Interrogatory No. 2, answered after Interrogatory No. 1, found that plaintiff's negligence was *a proximate cause* of the collision. In Iowa, where the plaintiff's negligence is *a proximate cause* of the collision, he cannot recover. *The defendant is not here contending that the Interrogatories were improper in form,*

and is not objecting to the form of Instruction No. 21 on last clear chance, it is simply contending that the Answer to Interrogatory No. 2 that plaintiff was guilty of negligence which was a proximate cause of the collision defeats his recovery under the Iowa last clear chance doctrine. (Emphasis added) Plaintiff is simply attempting to confuse the issue by arguing about the * * *

Supreme Court, U. S.
FILED
AUG 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-191

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

B. A. WEBSTER
GAMBLE, RIEPE, BURT, WEBSTER & FLETCHER
1021 Fleming Building
Des Moines, Iowa 50399
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Statement of Questions Presented for Review 1

I. The District Court's Order of October 9, 1973 denying defendant's Motion for Judgment n.o.v. and granting a new trial was not an appeal order 1

II. The District Court's Order of July 25, 1974 entering judgment against the defendant was the final judgment, and was an appealable order. Defendant's Notice of Appeal was filed within thirty days of that order. In addition, defendant's letter of July 11 (a copy of which was sent to the Clerk of the Court of Appeals within thirty days of the filing of the mandate) constituted adequate Notice of Appeal 2

III. In the alternative, the District Court's Order of July 25, 1974 clarified by its Order of August 9, 1974 constituted the granting of a thirty-day extension of time for appeal, pursuant to Rule 4(a) of the F.R. A.P., and Rule 60(b) of the F.R.C.P. 2

IV. The District Court in the first instance had jurisdiction to grant a new trial and the Court of Appeals had such power under the Federal Rules of Appellate Procedure 3

Statement of the Case 4

Argument 6

Issue I 6

Issue II 8

Issue III 9

Issue IV 13

Conclusion 16

Appendix (Letter of July 11, 1974 to plaintiff's counsel).. A-1

Cases Cited

C-Thru Prods., Inc. v. Uniflex, Inc., 397 F2d 952 .....3, 11

Donovan v. Esso Shipping Co., 259 F2d 65 ..... 2, 9

Fitzsimmons v. Yeager, 391 F2d 849 ..... 2, 9

Foaman v. Davis, 371 US 178, 83 S. Ct. 227, 9 L. Ed. 2d 222, on remand 316 F2d 517 ..... 2, 9

Graves v. Gen. Ins. Corp., 281 F2d 517 ..... 2, 9

Holz v. Smullan, 227 F2d 58 ..... 2, 9

Jackson v. Wilson Trucking Corp., 243 F2d 212, 71 Harvard Law Review (1958); 33 Notre Dame Law Review 216 (1957) 2, 3, 7, 14

Pasquale v. Finch, 418 F2d 627 (1969) 3, 12

Peterman v. CRI&P RR. Co., 493 F2d 88 14

Slaughter v. Philadelphia National Bank, 12 FR. Ser. 59d.3 (U.S.D.C. E.D. Pa. 1968) 3, 14

Torockio v. Chamberlain Mfg. Co., 456 F2d 1084 .....3, 12

State Farm Mutual Auto., Inc. v. Hinds, C.A. Ala. 1960, 277 F2d 4441 ..... 2, 6

Other Authorities

Federal Rules of Appellate Procedure:

Rule 4(a) 3, 5, 9, 10, 11, 12

Federal Rules of Civil Procedure:

Rule 59(d) 13

Rule 60 8

Rule 60(b)(6) 5, 8, 11

Moore's Federal Practice:

Vol. 5(a), ¶ 50.16 ..... 2, 6

¶ 51.11 .....3, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-191

FRANK L. PETERMAN,
Petitioner,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

The District Court's Order of October 9, 1973 Denying Defendant's Motion for Judgment n.o.v. and Granting a New Trial Was Not an Appealable Order.

Authorities

Jackson v. Wilson Trucking Corp., 243 F2d 212, 71 **Harvard Law Review** (1958), 33 **Notre Dame Law Review,** 216 (1957);

State Farm Mutual Auto, Inc. v. Hinds, C.A. Ala. 1960, 277 F2d 4441;

Moore's Federal Practice, Vol. 5(a), ¶ 50.16.

II

The District Court's Order of July 25, 1974 Entering Judgment Against the Defendant Was the Final Judgment, and Was an Appealable Order. Defendant's Notice of Appeal Was Filed Within Thirty Days of That Order. In Addition, Defendant's Letter of July 11 (a copy of which was sent to the Clerk of the Court of Appeals within thirty days of the filing of the mandate) Constituted Adequate Notice of Appeal.

Authorities

Donovan v. Esso Shipping Co., 259 F2d 65;

Fitzsimmons v. Yeager, 391 F2d 849;

Foaman v. Davis, 371 US 178, 83 S. Ct. 227, 9 L. Ed. 2d 222, on remand 316 F2d 254;

Graves v. Gen. Ins. Corp., 281 F2d 517;

Holz v. Smullan, 227 F2d 58.

III

In the Alternative, the District Court's Order of July 25, 1974 Clarified by Its Order of August 9, 1974 Constituted the Granting of a Thirty-Day Extension of Time for Appeal, Pursuant to Rule 4(a) of the F.R.A.P., and Rule 60(b) of the F.R.C.P.

Authorities

C-Thru Prods., Inc. v. Uniflex, Inc., 397 F2d 952;

Pasquale v. Finch, 418 F2d 627 (1969);

Torockio v. Chamberlain Mfg. Co., 456 F2d 1084;

Federal Rule of Appellate Procedure 4(a).

IV

The District Court in the First Instance Had Jurisdiction to Grant a New Trial and the Court of Appeals Also Had Such Power Under the Federal Rules of Appellate Procedure.

Authorities

F.R.A.P. 50(d);

Jackson v. Wilson Trucking Corp., 243 F2d 212 (C.A. D.C. 1957);

Slaughter v. Philadelphia National Bank, 12 FR. Serv. 59d.3 (U.S.D.C., E.D. Pa. 1968);

Moore's Federal Practice, ¶ 51.11;

See Respondent's Petition for Writ of Certiorari, From Mandate of Court of Appeals, Filed on or About April 29, 1974.

Respondent prays that this Court refuse to grant a Writ of Certiorari to review the opinion and judgment filed March 3, 1974 of the United States Circuit Court of Appeals for the Eighth Circuit.

Throughout this Brief, Petitioner Peterman will be referred to as the plaintiff, and the Rock Island Railroad as the defendant, to avoid confusion among the various appeals and Petitions for Writs of Mandamus and Certiorari.

STATEMENT OF THE CASE

1. On July 19, 1973 the Jury in the United States District Court for the Southern District of Iowa, returned its verdict in favor of the plaintiff in a railroad crossing collision case on the basis of last clear chance after having found in answer to a special interrogatory that plaintiff was guilty of negligence which was a proximate cause of the collision.

2. Within ten days defendant filed its Motion for Judgment n.o.v.

3. On hearing, the Court gave notice to the parties that it was considering granting a new trial *sua sponte* and requested Briefs. The Court, on October 9, 1973, denied Defendant's Motion for Judgment n.o.v., but ordered a new trial stating "It would not be fair or in the interest of justice to grant a judgment n.o.v." under the circumstances

4. On November 7, 1973 plaintiff moved to set aside the Order granting a new trial, and on December 5, 1973 this Motion was overruled.

5. On January 2, 1974, more than sixty days after the Order granting a new trial, plaintiff petitioned the Court of Appeals for a Writ of Mandamus.

6. On March 15, 1974 the Court of Appeals granted the Writ of Mandamus, holding that the Trial Court had exceeded its jurisdiction in ordering a new trial.

7. After Defendant's Petition for Writ of Certiorari to this Court was denied, the Court of Appeals gave notice on June 19, 1974 that its mandate would be sent to the Clerk of the District Court. Defendant's counsel received a copy of the notice, but did not receive a copy of the mandate.

8. Within thirty days of June 19, 1974 defendant's counsel had a telephone conference with the Deputy Clerk of the United States District Court in Des Moines, who advised defendant's counsel that a copy of the judgment would be forwarded when filed. It was not filed or forwarded.

9. On July 11, 1974, defendant's counsel replied to plaintiff's counsel's letter of July 2, stating it would appeal, with a copy to the Clerk of the District Court. (Appendix).

10. On July 24, 1974, defendant moved for entry of judgment and in the alternative for an extension of time for filing Notice of Appeal under F.R.A.P. 4(a). This was within the second thirty-day period following the filing of the mandate of the Court of Appeals.

11. On July 25, 1974 the District Court entered its Order reinstating the judgment.

12. On August 2, 1974, eight days thereafter, defendant filed its Notice of Appeal to the Court of Appeals.

13. On August 9, 1974 the District Court entered its Order holding that "defendant's failure to file Notice of Appeal within thirty days following the issuance of the mandate on July 18, 1974" constituted excusable neglect, and exercised "its discretion under Rule 60(b) to extend the time for filing Notice of Appeal."

14. On October 23, 1974, defendant filed its Brief on the merits in the Court of Appeals. Thereafter, on or about November 11, 1974 plaintiff filed a Motion to Dismiss the appeal, which was overruled on the hearing on the merits.

Defendant contends that its appeal was timely However, this matter may also be disposed of on the ground that defendant's appeal was allowed by the District Court within the second thirty-day period following the issuance of the mandate by the Court of Appeals, as allowed by the Rules.

ARGUMENT

I

The Court's Order of October 9, 1973 Denying Defendant's Motion for Judgment N.O.V. and Granting a New Trial Was Not an Appealable Order.

The Order of the Court of October 9, 1973 denying defendant's Motion for Judgment n.o.v. and granting a new trial was not an appealable Order. All of the authorities cited under Issue I so hold. As the Court said in *State Farm Mutual Auto. Inc. v. Hinds*, supra:

> "PER CURIAM.
>
> "This attempted appeal from an order denying defendant's motion for judgment notwithstanding the verdict, but granting its alternative motion for a new trial is not an appeal from a final decision of which this Court has jurisdiction. 28 U.S.C.A. 1291; Ford Motor Co. v. Busam Motor Sales, 6 Cir., 1950, 185 F.2d 531; Balicki v. Central Greyhound Lines, Inc., 3 Cir., 1945, 150 F.2d 402. The appeal is therefore
>
> "Dismissed."

Moore's Federal Practice, Vol. 5(A), ¶50.16 states:

> "¶50.16. *Appealability as Affected by Ruling on Motions.* Denial of a motion for judgment n.o.v. is not an appealable order; the appeal should be taken from the entry of judgment on the verdict. Where the trial court *denies* a motion for judgment n.o.v. but grants a motion to set aside the verdict, to vacate any judgment entered thereon and for a new trial, there is no judgment to appeal from. If an appeal were entertained it would be a futility because the Order for a new trial, which may be on various grounds not relating to the legal sufficiency of the evidence, is not ordinarily reviewable, and the case would have to be sent back to a new trial irrespective of what the appellate court might find as to the legal sufficiency of the evidence."

Plaintiff asserts that the Order of the Court of October 9, 1973 granting a new trial was absolutely void and that, therefore, the defendant if it wished relief should have appealed from the Order denying the judgment n.o.v. Notwithstanding the statement of the Court of Appeals in its Order on Petition for Writ of Mandamus, defendant submits that Judge Stuart's Order of October 9, 1973 was merely voidable. Defendant could not have been charged with notice that it was void and there was a legitimate controversy, supported by respectable authority that the District Court did have jurisdiction to enter such Order. (See: Dissent of Judge, now Chief Justice Burger, in *Jackson v. Wilson Trucking Corp.*, 243 F2d 212, 71 *Harvard Law Review* (1958); 33 *Notre Dame Law Review*, 216 (1957).)

If the plaintiff had not filed its Petition for Writ of Mandamus or appealed, Judge Stuart's Order would have become a finality. The Order was, in fact, originally entered to give relief to the plaintiff from the harsher judgment of granting the Motion for Judgment n.o.v. After the entry of the Order, plaintiff's foot-dragging in filing a further Motion to Set Aside the Order of the Court caused the expiration of any time to appeal from the Order of October 9.

The defendant chose to accept the remedy of a new trial at that stage, feeling that the Order was not appealable under the authorities above cited. To now hold that defendant was charged with notice that Judge Stuart's Order was void and of no effect and to hold that it was required then and there to appeal would be now to deny the defendant its right of appeal on the merits and work a substantial injustice.

Plaintiff urges that defendant was required to appeal within thirty days of the original judgment of July 19 and not having done so may not now obtain relief under F.R.C.P. 60, as more than one year has passed since the date of that judgment.

As defendant has pointed out, it would be grossly unfair to rule that its time for appeal ran from that date, instead of from the date of the mandate of this Court of June 19, 1974, or the Order of the Court reinstating the judgment of August 9, 1974. Nevertheless, plaintiff overlooks the fact that Rule 60(b)(6) states the Court may relieve a party from a final judgment for "*any other reason* justifying relief from the operation of judgment", and that this relief is not limited to the one-year period required of the other reasons for relief set forth in that Rule. (emphas supplied)

II

The Court's Order of July 25, 1974 Entering Judgment Against the Defendant Is the Final Judgment, and Is an Appealable Order. Defendant's Notice of Appeal Was Filed Within Thirty Days of That Order.

It is the general rule that only final judgments are appealable. It was thus the feeling of defendant's counsel that after the issuance of the mandate by this Court on the Petition for Mandamus, it was necessary for the District Court to enter an Order reinstating the judgment. This feeling was confirmed by a conversation with a Deputy Clerk of the District Court, and shared by the Court in its Order of July 25, 1974. That was the appealable Order.

However, even if the appeal time ran from June 19, 1974, the defendant took the proper steps for an extension of time, which was granted, as more fully appears in Brief Point III below.

In fact, defendant's letter to plaintiff's counsel of July 11, 1974 (Appendix), a copy of which was sent to the Clerk of the United States District Court at Davenport, Iowa, was in itself adequate Notice of Appeal. It was written and filed with the Clerk within the thirty-day period from the date of the filing of the mandate. This letter stated: "It is our intention to appeal from the judgment when filed, and we will file a supersedeas bond promptly."

That this letter is sufficient, see: *Graves v. Gen. Ins. Corp.*, 381 F2d 517; *Holz v. Smullan*, 277 F2d 58; *Donovan v. Esso Shipping Co.*, 259 F2d 65; *Fitzsimmons v. Yeager*, 391 F2d 849; *Foaman v. Davis*, 371 US 178, 83 S. Ct. 227, 9 L. Ed.2d 222, on remand 316 F2d 254.

Plaintiff has never been misled as to defendant's intentions in this matter.

III

In the Alternative, the Court's Order of July 25, 1974 Clarified by Its Order of August 9, 1974 Constitutes the Granting of a Thirty-Day Extension of Time of Appeal, Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, and Rule 60(b) of the Federal Rules of Civil Procedure.

This controversy is easily disposed of by reading the last paragraph of F.R.A.P. 4(a) and applying it to the facts revealed by the record. That paragraph states:

> "Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but

> if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

The record shows that the mandate of this Court was filed in the Office of the Clerk of the District Court on June 19, 1974. Assuming that defendant's time for appeal ran from that date, it had until July 20 to file its Notice of Appeal.

On July 24, 1974, four days after the expiration of the thirty days, defendant filed its Motion for Entry of Judgment and in the Alternative for an Extension of Time for filing Notice of Appeal under Rule 4(a). The Court entered judgment on that Motion on July 25, reinstating the original judgment. In its Order of July 25, the Court stated that it "assumed that the opinion and judgment directed the issuance of a formal Writ of Mandamus, and has not to this date entered an Order in accordance with said judgment or opinion. Having now been assured that the mandate previously issued is sufficient," the Court ordered judgment entered.

This is the Order which the defendant urges it has the right to appeal from, as set forth in Issue II herein.

However, defendant's Notice of Appeal was filed on August 2, 1974, within the second thirty-day period contemplated by F.R.A.P. 4(a). It specifically requested the relief based on excusable neglect required by F.R.A.P. 4(a). This excusable neglect consisted of counsel's belief, reinforced by a conversation with a Deputy Clerk, that a formal judgment would be entered by the Court after the mandate was filed. This belief was apparently shared by the Court.

In ruling upon Plaintiff's Motion to Set Aside its judgment, which was filed after the Notice of Appeal, the Court in its Order of August 9, 1974 stated: "The confusion as to whether further action by the Trial Court was necessary to start the time

for appeal running was sufficient excuse for defendant's failure to file Notice of Appeal within thirty days following the issuance of the mandate on July 18, 1974. As the supersedeas bond adequately protects plaintiff's judgment from possible insolvency of the defendant and the Court favors disposition of the issues on their merits, the Court would exercise its discretion under Rule 60(b) to extend the time for filing a Notice of Appeal, if it has the authority to do so." That the Trial Court has such authority is clear from a reading of F.R.A.P. 4(a), as well as F.R.C.P. 60(b), without further reference to authorities.

Nevertheless, the authorities cited under Issue III above are clear that the Court does have this authority and in some instances it has been allowed *nunc pro tunc*, even after the expiration of the sixty days.

The Court of Appeals did not go that far in this case, as defendant's Motion for Extension under F.R.A.P. 4(a) was filed four days after the expiration for time for appeal (if the time, in fact, expired thirty days after the filing of the mandate).

In *C-Thru Prods., Inc. v. Uniflex, Inc.*, supra, the Second Circuit allowed relief where the motion was filed *after* expiration of the sixty-day period. The Court there said:

> "We reject the contention that the appeal is barred as untimely. The amended judgment was filed July 24, 1967. Notice of appeal and bond were filed September 20, 1967, with a motion to grant additional time to file the appeal. Affidavits and memoranda on the motion were filed by defendant September 29 and plaintiffs on October 2. Hearing was had on October 4, decision rendered October 10, an order extending time on a sufficiently supported finding of excusable neglect was entered October 25, and an order that the notice of appeal filed September 20 be deemed timely filed, was entered November 2.

"Appellee contends that Rule 73, setting the time for appeal at 30 days and permitting extension of time for not more than an additional 30 days on a showing of excusable neglect, must be strictly construed to require that the showing must be made and order entered within the 60-day period following entry of the judgment from which appeal was taken. Such an interpretation would be unduly harsh and contrary to the spirit and purpose of Rule 73 as in effect in 1967. The time limitation is intended to set a period on which the parties may rely for required action by a litigant, not to dragoon a busy trial court into hasty and ill-considered action by the risk of destruction of appellate rights if the court does not meet the fixed deadline. We may note in this case appellee took nine days, extending over the expiration of the sixty-day period, to respond. On September 20 appellee was on timely notice so that it might take whatever steps were needed to prepare to resist the appeal. Appellants' action was timely, and the court's ruling effective. Compare Evans v. Jones, 366 F.2d 772, 773 (4 Cir. 1966)."

In *Torockio v. Chamberlain Mfg. Co.*, supra, the Third Circuit went even further, stating:

"The case will be remanded to the district court for consideration of a motion, to be promptly filed, pursuant to Fed.R.App.P. 4(a) to approve *nunc pro tunc* the filing of a notice of appeal on July 28, 1971, and for such other proceedings as the district court may find appropriate."

In *Pasquale v. Finch*, supra, the First Circuit stated:

"* * * we agree with the view of the government, the district court, and the Second, Fourth, and Sixth Circuits that the district court was not required to make its ruling on the government's motion within the 30-day period after May 12. C-Thru Products, Inc. v. Uniflex, Inc., 397 F.2d 952, 954-955 (2d Cir. 1968); Evans v. Jones, 366 F.2d 772, 773 (4th Cir. 1966); Reed v. People of the State of Michigan, 398 F.2d 800, 801 (6th Cir. 1968); see Reconstruction Finance Corp. v. Prudence Group, 311 U.S. 579, 582, 61 S.Ct. 331, 85 L.Ed. 364 (1941)."

There was no need in this instance to remand the matter to the District Court to find whether or not there was "excusable neglect," for the District Court has already so found in its Order of August 9, 1974.

Here the Motion for Extension of Time under F.R.A.P. 4(a) was not filed after the expiration of sixty days, as in the cases above cited, but within the second thirty-day period, as allowed by the Rule. The formal Notice of Appeal was also filed within the second thirty-day period.

IV

The District Court in the First Instance Had Jurisdiction to Grant a New Trial and the Court of Appeals Also Had Such Power Under the Federal Rules of Appellate Procedure.

Plaintiff asserts that Rule 59(d) of the F.R.C.P. does not authorize the Court of Appeals to order a new trial where the appellant has unsuccessfully sought a judgment n.o.v. Plaintiff overlooks the final clause of Rule 59(d) which authorizes the granting of a new trial by the Court of Appeals "or from directing the trial court to determine whether a new trial should be granted."

In this case, Judge Stuart had already determined that a new trial should be granted and under these circumstances, the Court of Appeals was entirely correct in ordering a new trial.

In fact, the Court of Appeals in effect merely corrected the mistake that it had made on plaintiff's Petition for Writ of

Mandamus in *Peterman v. CRI&P RR. Co.*, 493 F.2d 88, where it held that Judge Stuart did not have the power to order a new trial. This question was covered by the defendant in its Petition for Writ of Certiorari filed herein on or about April 29, 1974 and which was denied. *Moore's Federal Practice* states, at ¶ 51.11:

> "But once the finality of the judgment has been suspended by a proper motion, which is pending and undecided, the last sentence of Rule 59(d), added in 1966, makes it clear that after giving the parties notice and an opportunity to be heard, the trial court has the power to grant a new trial, on its own initiative, more than 10 days after the entry of judgment for any reason for which it might have granted a new trial on motion of a party."

To the same effect was the holding of Judge Weiner in *Slaughter, supra*:

> "Although the instant situation is not the precise one which the 1966 amendment to Rule 59(d) sought to remedy, it is one for which Prof. Moore's paragraph, cited with approval of the Advisory Committee on Rules, holds a decided view. In line with the position taken in the treatise and now written into the Rule, Prof. Moore states:
>
> > 'the trial court may respond to a motion for judgment n.o.v. by granting a new trial instead, even after ten days have elapsed from entry of the judgment.' "

The situation has now arisen which Justice Burger contemplated in his dissent in *Jackson v. Wilson Trucking Corp., supra*. In that case Justice Burger pointed out that to deny the Trial Court the right to grant a new trial in these circumstances, but to allow the Court of Appeals to grant it, would only lead to a circuitous result. Justice Burger stated:

> "The majority holding reinstates the appellant's jury verdict. If the appellee hereafter appeals from the denial of

> his motion for judgment n.o.v., this court must then determine whether the evidence is legally sufficient to sustain the verdict. In that posture this court could then (a) affirm the lower court's denial of the motion for judgment n.o.v., allowing judgment on the verdict to stand, or (b) reverse the order denying judgment n.o.v. and remand for entry of judgment on that motion, or (c) remand under 28 U.S.C. § 2106 for a new trial, if such action be considered 'just under the circumstances'.
>
> 'As final judgment follows either action under (a) or (b) above, our self-imposed limitations will have effectively precluded exercise of any discretion by the court best equipped to do so. If, under (c) above, we remand for a new trial, it is only after needless delay and expense that we have accomplished precisely what the trial court attempted to do in the first place.
>
> "* * * Rule 59(d) is directed at cases where no litigant makes a motion of any kind, but when the court thinks the record does not support the verdict. In such case the trial court, without any motion *of any kind*, is for a 10 day period given power sua sponte to grant a new trial. It is only the sua sponte which has a time limit. Rule 59(d) was not intended to apply to a situation where a motion for judgment n.o.v. is made, since as I have pointed out it rarely if ever that a motion can be made and heard within the time limit. Furthermore, once the finality of a judgment has been suspended by a timely motion for judgment n.o.v., as occurred here, there is no sound reason why the time limitation imposed by Rule 59 should apply. 7 Moore's Federal Practice 3851, 3872-3 (2d ed. 1952)."

Defendant asserts that the Trial Court had the right and duty to order a new trial in the first instance, as it did. Clearly the Court of Appeals had that right.

CONCLUSION

1. Plaintiff asserts that defendant should have appealed from Judge Stuart's original Order denying its motion for judgment n.o.v., but granting a new trial, notwithstanding the fact that that was not an appealable Order. He urges that more than one year passed from that Order to defendant's appeal on the merits, but overlooks the fact that Rule 60(b)(6) allows appeal from a final judgment beyond the one year limit for "any other reasons justifying relief from the operation of judgment."

2. Plaintiff asserts that as defendant's Notice of Appeal was filed more than thirty days after the issuance of the mandate by the Court of Appeals in the mandamus action, that its appeal was not timely, but overlooks the fact that Judge Stuart specifically granted defendant the right to appeal within the second thirty-day period for excusable neglect, as allowed by the Rules.

3. Plaintiff asserts that the Court of Appeals had no power to grant a new trial, although such power is plainly allowed by the Rules, and in the event certiorari is granted in this case, this Court should hold that the decision of the Court of Appeals for the Eighth Circuit in the mandamus action (493 F2d 88) was erroneous and that Judge Stuart did have the right to grant a new trial in the first instance.

In one of his post-trial Orders, Judge Stuart referred to this case as "as procedural headache", which has largely been caused by the plaintiff's filing of spurious and repetitious post-trial motions.

A new trial has now been granted "in the interest of justice", as Judge Stuart ordered in the first instance. This Court

should not be burdened with this matter and the Petition for Writ of Certiorari should be denied.

Respectfully submitted

B. A. WEBSTER
GAMBLE, RIEPE, BURT, WEBSTER
& FLETCHER
1021 Fleming Building
Des Moines, Iowa 50309
Attorneys for Respondent

APPENDIX

Gamble, Riepe, Burt, Webster & Fletcher
Attorneys at Law
1021 Fleming Building
Des Moines, Iowa 50309

July 11, 1974

Mr. Lloyd E. Humphreys
Attorney at Law
8th Floor
Merchants National Bank Building
Cedar Rapids, Iowa 52401

Re: Frank L. Peterman v. Chicago, Rock Island and Pacific Railroad Company

Dear Lloyd:

I have your letter of July 2, and we have received notice from the Eighth Circuit that the mandate has been sent down to re-instate the Judgment. However, we have not as yet received a copy of the judgment.

It is our intention to appeal from the judgment when filed, and we will file a supersedeas bond promptly.

Very truly yours,

B. A. Webster

BAW/bn

cc: O. L. Houts
Clerk, U. S. District Court
Davenport, Iowa
(Civil No. 4-977-D)